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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0693**

Linda Vlieger,
Relator,

vs.

Fairmont Orthopedics & Sport Medicine, P.A.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 13, 2014
Affirmed
Chutich, Judge**

Department of Employment and Economic Development
File No.: 30519656-3

Linda Vlieger, Fairmont, Minnesota (pro se relator)

Fairmont Orthopedics & Sport Medicine, P.A., Fairmont, Minnesota (respondent employer)

Lee B. Nelson, Christine Hinrichs, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Chutich, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Relator Linda Vlieger challenges the unemployment-law judge's decision that she committed employment misconduct and is therefore ineligible to receive unemployment benefits. Because the record substantially supports the unemployment-law judge's findings, we affirm.

FACTS

Vlieger worked at Fairmont Orthopedics and Sports Medicine (Fairmont) for less than one year, from April to November 2012, as a collections specialist in the billing office. JoDell Rakness, Vlieger's supervisor, and Steven Hilpipre, Chief Executive Officer of Fairmont, discharged Vlieger on November 26, 2012.

Vlieger applied for unemployment benefits from respondent Department of Employment and Economic Development (department), and the department determined that she is ineligible for benefits because she was discharged for employment misconduct. Vlieger appealed, and the unemployment-law judge conducted a telephone hearing. Bridget Ishdahl, Steven Hilpipre, and JoDell Rakness testified for Fairmont, while Vlieger appeared on her own behalf.

Hilpipre testified that Vlieger was discharged because she made numerous personal phone calls during work hours that affected her work performance. According to Fairmont's written phone policy, employees may not make personal phone calls while working, but may make personal calls during their breaks. Hilpipre told the staff about this policy at a staff meeting in approximately June or July 2012. At Vlieger's 90-day

review in July 2012, Rakness notified her that she is only allowed to make personal calls during breaks. Rakness testified that the personal calls continued after Vlieger's review.

Hilpipe testified that Vlieger made about 110 personal phone calls on the business phone during the end of July through August 2012; that she received six personal calls each month in September and October 2012 on the business phone; and that she received five personal calls on the business phone in the first two weeks of November.

Vlieger knew "personal calls would be grounds for dismissal" and acknowledged that she was told in July 2012 that she "needed to cut down on personal calls." She admitted that she made personal calls at her desk phone, but Vlieger argued that she only made personal calls during her breaks.

Hilpipe believed that Vlieger's time spent on personal calls affected her performance because the amount of accounts-receivable that she was attempting to collect should have decreased. Hilpipe also testified that it was difficult to monitor Vlieger's performance because, contrary to work policy, Vlieger kept no notes for the accounts on which she was working. Vlieger responded that, while she knew that she was supposed to keep notes of her accounts in a certain software system, she chose to keep the notes on a separate spreadsheet, contrary to work policy.

The unemployment-law judge determined that Vlieger was dismissed for employment misconduct. Vlieger unsuccessfully sought reconsideration, and this certiorari appeal followed.

DECISION

An employee who is discharged because of employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). “Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2012).

“Whether the employee committed a particular act is a question of fact,” which we review in the light most favorable to the decision. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). When the evidence substantially sustains the unemployment-law judge’s findings, we will not disturb them. *Id.* But we review de novo “[w]hether a particular act constitutes disqualifying misconduct.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Factual Findings Concerning Vlieger’s Conduct

Vlieger asserts that “[n]o indication was made that [personal calls] could not be on the business phone”; Fairmont had conflicting policies for phone usage—one oral and one written; she made personal calls only during her break time; and other employees violated the policy but were not disciplined. She also challenges the evidence presented by Fairmont at the hearing, contending that her employer failed to provide documentation of the personal phone calls she made or received and that Fairmont improperly relied upon accounts by other employees of Vlieger’s telephone use.

In the appendix to her brief, Vlieger attaches and refers to documents, including phone records, which were not submitted for the evidentiary hearing. But “[a]n appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988). Accordingly, we cannot consider these documents in our decision.

At the evidentiary hearing, Fairmont’s witnesses provided testimony that Fairmont had a written policy stating that employees are not permitted to make personal phone calls during work time and that Vlieger was informed of this policy. Vlieger conceded during her testimony that her supervisor told her that personal calls were to be taken on cell phones away from her desk during breaks.

Rakness and Hilpipe did not provide documentation of Vlieger’s phone calls, but they testified that Vlieger made and received numerous personal calls and that the calls did not occur only over breaks. Hilpipe also testified, based upon a document that he reviewed during the hearing, as to the specific number of incoming personal phone calls that Vlieger received.¹

¹ Rakness and Hilpipe testified from personal knowledge about the level of Vlieger’s use of the business phone for personal purposes. In any event, Vlieger’s concern about the use of hearsay from other employees who may have told her employers about her phone use “to cause problems” for Vlieger is misplaced. Hearsay evidence is admissible in an unemployment-benefits hearing if “it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.” Minn. R. 3310.2922 (2011). Under the circumstances here, it was reasonable for Rakness and Hilpipe to rely on the reports of co-workers concerning the volume and timing of Vlieger’s personal calls.

The unemployment-law judge credited the employer's testimony over Vlieger's and concluded that Vlieger "intentionally chose to use the employer's business phone to take and receive personal calls whether or not on her break." As required by law, the unemployment-law judge explained the reason for her credibility determination, stating that Vlieger's testimony was not credible because it was inconsistent. *See* Minn. Stat. § 268.105 (1)(c) (2012). The unemployment-law judge further found that the testimony of Fairmont's witnesses was more plausible and consistent.

"Credibility determinations are the exclusive province of the [unemployment-law judge] and will not be disturbed on appeal." *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quotation omitted). We therefore defer to the unemployment-law judge's decision to credit the testimony of Fairmont's witnesses and to reject Vlieger's account. *See Peterson*, 753 N.W.2d at 774. The record substantially supports the factual findings of the unemployment-law judge that Vlieger failed to comply with Fairmont's phone policy.

Legal Determination of Employment Misconduct

"When an employee's refusal to carry out a directive of the employer is deliberate, calculated, and intentional, then the refusal is misconduct." *Schmidgall*, 644 N.W.2d at 806. "The general rule is that if the request of the employer is reasonable and does not impose an unreasonable burden on the employee, the employee's refusal to abide by the request constitutes misconduct." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). Here, the unemployment-law judge concluded that "Vlieger's intentional disregard of the employer's phone use policy

after being warned and her failure to comply with the policy to input notes with accounts” showed a serious disregard of her employer’s interest and of the standards of behavior Fairmont had a right to expect. We agree.

Vlieger’s failure to abide by Fairmont’s phone policy is employment misconduct. She knew of the phone policy and was warned about abiding by the policy, yet continued to make and receive personal calls at work, whether on the business phone or on her cell phone. Because Fairmont may reasonably expect its employees to limit their personal calls, Vlieger’s refusal to abide by this request shows a substantial lack of concern for her job.² Finally, Vlieger’s claim that other employees violated the phone policy, but were not similarly discharged, is not relevant here. *See Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (providing that whether employer chose to enforce rules against only one employee is irrelevant in determining whether employee engaged in misconduct), *review denied* (Minn. Aug. 20, 1986).

Affirmed.

² Because we conclude that the unemployment-law judge correctly concluded that Vlieger engaged in employment misconduct concerning her phone use, we do not review the issue of whether Vlieger also engaged in employment misconduct for failing to make written notes on the accounts assigned to her.